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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB-433X

IDAHO NORTHERN & PACIFIC RAILROAD COMPANY
— ABANDONMENT EXEMPTION —
IN WALLOWA AND UNION COUNTIES, OR

Decided: December 12, 2001

In this decision, we deny a petition to reopen this rail abandonment exemption proceeding, remove the four existing environmental conditions, and substitute a modified environmental condition.

This proceeding was instituted on December 1, 1994, when Idaho Northern & Pacific Railroad Company (IN&P) filed a petition[1] with the Interstate Commerce Commission (ICC), our predecessor agency,[2] seeking an exemption under former 49 U.S.C. 10505 from the prior approval requirements of former 49 U.S.C. 10903-04 to abandon a 60.58-mile portion of IN&P's Joseph Branch, between milepost 23.0 near Elgin and milepost 83.58 at Joseph, in Wallowa and Union Counties, OR (the line). By decision served March 12, 1997, we granted the exemption, subject to certain conditions (largely relating to environmental concerns in connection with salvage activities) and provided that the exemption would become effective on April 17, 1997.[3]

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[1] The petition was supplemented on February 15, 1995.

[2] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), abolished the ICC and transferred certain functions and proceedings to the Board, effective January 1, 1996. Section 204(b)(1) of ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10903. Accordingly, most citations (as indicated) are to the former sections of the statute.

[3] Subsequently, by decision served April 16, 1997, we denied a petition to reopen filed by Wallowa Forest Products, LLC. Additionally, by decision served May 16, 1997, a request for issuance of a notice of interim trail use under 16 U.S.C. 1247(d) was denied, but a request for a

(continued...)

Before us now is a petition filed July 30, 2001, more than 4 years after the exemption's original effective date, by the Oregon Department of Transportation (OR-DOT), seeking (1) to reopen this proceeding in order to vacate IN&P's allegedly "unexecuted and now-expired authority" to abandon the line; (2) to address environmental mitigation conditions; (3) to consider allegations of substantially changed circumstances relating to future traffic; and (4) to allow the filing by OR-DOT of an offer of financial assistance (OFA) to purchase the line. IN&P has replied to the petition to reopen.[4] Wallowa County submitted a letter dated October 23, 2001, indicating that, in Idaho Northern Pacific Railroad Company and Wilson Building Centers, Inc., d/b/a Klamert Railroad Salvage v. Wallowa County, CV-01-1212 JO (D. Or. Sept. 24, 2001), the court held in abeyance a ruling on plaintiffs' motion for a preliminary injunction enjoining the County from interfering with the removal of the track until the earlier of December 14, 2001, or a ruling by the Board on the petition to reopen.

The Notice of Abandonment Consummation Issue. OR-DOT's initial argument is that this abandonment authority should be found to have expired because IN&P failed to file a notice of consummation by March 1999 (one year from the date of the Board's last decision in this case), pursuant to 49 CFR 1152.29(e)(2). This proceeding was instituted in 1994, however, long before the Board adopted the cited rule.[5] Accordingly, that rule does not apply, and no notice of consummation was required in this case. Moreover, even under the current rule, the 1-year window for consummating abandonment is tolled if there are legal or regulatory barriers to consummation. 49 CFR 1152.29(e). Thus, because of the outstanding conditions we had

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[3](...continued)
public use condition under former 49 U.S.C. 10906 was granted, which remained in effect until October 14, 1997. Then, in another decision served March 9, 1998, the Director of the Office of Proceedings denied a further request for issuance of a notice of interim trail use.

[4] In addition, a letter addressing environmental concerns was submitted on August 23, 2001, by the Portland, OR regional office of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, United States Department of Commerce (NMFS).

[5] In adopting that rule, we made clear that it was not to be applied retroactively.

> UP and AAR seek clarification that our new notice of consummation requirement applies only to abandonment proceedings filed after the enactment of ICCTA or the effective date of the new rules, respectively. We did not intend this provision to apply retroactively. Accordingly, we clarify that the rule requiring a mandatory notice of consummation applies only to abandonment proceedings filed after the effective date of the new regulations, January 23, 1997.

Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 2 S.T.B. 311, 317 (1997).

imposed in our March 1997 decision in this case, IN&P could not have lawfully consummated this abandonment in 1999.[6] See also CSXT—Operation Exemption—Kanawha County, WV, Finance Docket No. 32475 et al. (ICC served Sept. 14, 1994).

Future Traffic/OFA. A petition to reopen an abandonment proceeding must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. 49 CFR 1152.25(e)(4).[7] In its petition to reopen, OR-DOT alleges materially and substantially changed circumstances, in that the economy of the region has assertedly stabilized sufficiently to support rail operations. IN&P points out in reply, however, that there is not a single guaranteed carload of freight—only allegations that some shippers have expressed a desire to ship by rail—and notes that no traffic has moved on the line, nor has any one requested rail service on the line, in over 5 years.

Speculation that additional traffic might materialize in the future does not justify forcing a railroad to continue to incur losses in operating a rail line, nor does it justify tying up assets that could be used more productively elsewhere. See, e.g., Burlington Northern Railroad Company—Abandonment Exemption—Between Mesa and Basin City, Franklin County, WA, STB Docket No. AB-6 (Sub-No. 370X) (STB served Jan. 27, 1997); Consolidated Rail Corporation—Abandonment Exemption—In Wicomico County, MD, STB Docket No. AB-167 (Sub-No. 1176X) (STB served Feb. 19, 1997). OR-DOT has not presented sufficient evidence to show that future traffic levels would support the resumption of rail service on this line. Accordingly, it would be inappropriate to reopen this exemption proceeding on this account.

OR-DOT also raises as a changed circumstance a claim that the value of the line is only about half of the $3.7 million net liquidation value (NLV) that IN&P originally claimed. OR-DOT asserts that Oregon's legislature has made funding available to support an offer to purchase the line, in the amount of $1,894,295 (the alleged value of the line) less assertedly unpaid property taxes of $54,766.98. IN&P contends, however, that a recent appraisal of the line values the track and track materials at a total value of $7.2 million, and IN&P insists that it is far too late to invoke the statutory provisions for an offer of financial assistance. IN&P thus characterizes the purchase offer as "over 4 years late and over $5 million short of the mark." IN&P Reply at 10.

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[6] As discussed below, IN&P did not complete the activities needed to comply with the outstanding environmental conditions until this year, presumably at least in part because IN&P has been working with various local and state officials on the sale of the line during the last several years.

[7] See also former 49 U.S.C. 10327(g), applicable at the time the petition seeking this exemption was filed.

There is no need to consider the NLV of the line because the OFA procedures plainly are no longer available with respect to this line. The statutory time limits that were applicable at the time this abandonment proceeding was instituted for processing such cases and entertaining OFA requests were intended by Congress to protect carriers from protracted abandonment proceedings. See Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY; In the Matter of an Offer of Financial Assistance, Docket No. AB-167 (Sub-No. 1094) (ICC served July 22, 1993) (Chelsea);[8] Hayfield Northern R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 629-31 (1984). While there were occasions when OFA deadlines have been extended in exemption proceedings, such extensions generally were for short time periods and were granted only in exceptional circumstances or when both sides agreed. Cf. Seminole Gulf Railway, Inc.—Abandonment Exemption—In Lee County, FL, Docket No. AB-400 (Sub-No. 2X) (ICC served December 22, 1994). There is no precedent to entertain an OFA filed 4½ years after its due date, and to do so plainly would be inconsistent with Congressional intent. Accordingly, we deny OR-DOT's request that we institute an OFA proceeding at this late date. The parties, however, are free to negotiate a voluntary agreement for continued rail service outside the OFA process.

Environmental Conditions. This exemption was granted subject to four environmental conditions.[9] Condition No. 1 prohibited IN&P from conducting salvage operations in the period July 1 through August 15, "during which Chinook Salmon are hatching." OR-DOT argues that the dates in this condition are incorrect because that time period is actually the optimum time for

[8] As the ICC explained, in Chelsea at 4: "These deadlines were designed to ensure that railroads would be able to dispose of their property expeditiously and by a date certain. Potential offerors were given only 10 days to file an OFA, and we were given 5 days to rule on them. Barring any extenuating circumstances, to reopen an OFA decision based on allegations of new evidence and changed circumstances would violate the entire thrust of the statutory scheme. Aside from the inevitable delay, it would give potential offerors the opportunity to pursue an OFA well after their due date."

[9] The environmental conditions provide: (1) IN&P shall not conduct salvage operations in the period July 1 through August 15, during which Chinook Salmon are hatching; (2) if bridges are to be removed, IN&P shall consult with the U.S. Army Corps of Engineers, Portland District, to determine if permits are required; (3) IN&P shall take all reasonable steps to preclude the leakage of fuel, lubricants and related substances from machinery used in salvage operations; and (4) prior to commencing salvage operations, IN&P shall contact Wallowa County to determine what measures, if any, must be taken to comply with the Wallowa County/Nez Perce Salmon Habitat Recovery Plan.

conducting salvage along the waterways involved.[10] In addition, OR-DOT states that the Snake River Steelhead, another species indigenous to the Grande Ronde and Wallowa system, was added to the list of endangered species on August 18, 1997, and that a third species, the Bull Trout, was listed in 1998. OR-DOT contends that these additional endangered species should be considered in setting conditions for salvage activity, even though these species became endangered after the environmental conditions were imposed in this case. NMFS is concerned that no consultation appears to have been undertaken under section 7 of the Endangered Species Act (ESA) concerning salmon and steelhead and notes that consultation under the Sustainable Fisheries Act of 1996 (SFA) also was not completed in this case.

In its reply IN&P agrees that the time periods in Condition No. 1 are wrong, but it explains that this condition is not in conflict with the practices of local agencies with jurisdiction over aquatic resources, as the salvage operations contemplated on the line will not involve any in-water work. In addition, IN&P asserts that its salvage work plan, a copy of which it has provided, will protect the Chinook Salmon and is also more than adequate to satisfy any requirements applicable to Snake River Steelhead and Bull Trout. Nor, it contends, has OR-DOT suggested any additional steps that need to be taken to protect fish species.

OR-DOT's arguments pertaining to the two additional species and the concerns raised by NMFS regarding the ESA and SFA are untimely. As the court recognized in Friends of Sierra R. R. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989), cert. denied, 493 U.S. 1093 (1990) (Friends of Sierra), evidence that could have been presented earlier is not new evidence or changed circumstances, but merely newly presented evidence, and there is a need for finality in administrative decisionmaking. The petition for exemption in this matter was filed properly and with proper notification, putting all interested parties on notice of the issues involved. As required by our environmental regulations, IN&P submitted an environmental report with its petition and notified the appropriate federal, state and local agencies of the opportunity to submit information concerning potential environmental impacts. Our Section of Environmental Analysis (SEA) then issued an Environmental Assessment (EA) for public review and comment on February 14, 1995, based on its independent evaluation of the information provided by the railroad and consultation with appropriate agencies, including the U.S. Fish and Wildlife Service. In the EA, SEA recommended the same four environmental conditions that the Board subsequently imposed in its March 1997 decision. However, no comments on any of the proposed environmental conditions (or any other aspect of the EA) were submitted, and no agency or other party requested a section 7 consultation process pursuant to the ESA. Furthermore, even though the SFA was enacted in 1996 and the two new endangered species were named in 1997 and 1998, OR-DOT and NMFS inexplicably waited until now to bring their claims before the agency. Under Friends of Sierra, OR-DOT and NMFS are attempting to raise issues that could and should have been raised earlier, and we will not entertain them now.

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[10] NMFS makes a similar argument.

In any event, OR-DOT and NMFS have not shown that IN&P's proposed salvage methods will not protect salmon and the other fish species that may be present in the area. As previously noted, in its reply IN&P submitted a detailed Work Plan for Track Removal, dated May 22, 2001, to be performed by Klamert Railroad Salvage and a subsequent Revision to the Work Plan, dated June 22, 2001 (collectively the Work Plan).[11] SEA has reviewed the Work Plan and the pleadings filed in this proceeding addressing compliance with the four environmental conditions and has concluded that, notwithstanding the inadvertent error in the dates mentioned in Condition No. 1, the salvage methods outlined in the Work Plan should protect the Chinook Salmon and any other fish species that may be present, not only during spawning season but whenever salvage occurs throughout the year. We agree that the Work Plan appears to contain reasonable measures for salvaging this line.[12] Consequently, Condition No. 1 can now be removed.

As SEA has concluded, IN&P also has taken the steps needed to satisfy the remaining environmental conditions. The Work Plan specifies that no bridges are to be removed, thus obviating the need to consult with the U.S. Army Corps of Engineers (Condition No. 2). Furthermore, in accordance with Condition No. 3, the Work Plan provides that measures will be taken to prevent leakage of fuel, lubricants, and related substances from machinery used in salvage operations. And as required by Condition No. 4, IN&P has contacted Wallowa County to determine what measures, if any, must be taken to comply with the Wallowa/Nez Perce County Salmon Habitat Recovery Plan (Recovery Plan). See IN&P Reply at 11-14 (detailing the railroad's activities from 1998 to the present and explaining that under the Work Plan, salvage activities will be conducted exclusively within the rail bed, which is generally located at least 20 feet away from the edge of any river or river bank, and that the Work Plan will otherwise avoid

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[11] The Work Plan specifies that salvage activities will be limited to the removal of rail, ties and track materials. In addition, bridges and ballast will remain in place; salvage will be conducted exclusively within the rail bed; all materials from the line will be stockpiled and sorted at areas away from all bodies of water; the rail bed will be roughgraded with ballast retained to maintain sediment control; any banks along the right-of-way that are inadvertently disturbed will be reseeded with native vegetation; salvage will be done in a manner to limit dust from entering the nearby waterbodies; and salvage operations will not disturb the existing drainage. According to the Work Plan, salvage operations are not expected to produce any soil erosion or sedimentation, and all activities should be fully consistent with the county's salmon recovery plan. Moreover, staging areas will not be located within or immediately adjacent to wetlands, bodies of water, or any other type of environmentally sensitive areas, and staging areas will be subjected to the approval of a subcommittee that will be set up later.

[12] Significantly, no party before us here has stated that the techniques described in the Work Plan are inadequate or has suggested any additional steps that need to be taken.

impacts to the nearby river and ensure that salvage is conducted in a manner consistent with the Recovery Plan).

IN&P notes that the County has yet to approve the Work Plan (or to suggest specific changes other than the need for more detail in the May 2, 2001 Work Plan, which led to the revised work plan dated June 22, 2001). IN&P is concerned that, because the County wishes to buy the line, the County will attempt to interfere with the salvage of the line through lengthy and onerous application of local permitting or zoning regulations.[13] See IN&P Reply at 15-16.

However, Congress gave the Board exclusive and plenary authority over rail line abandonments,[14] and we have already approved the abandonment and salvage of this line subject to satisfaction of the four environmental conditions, the purposes of which have been met.[15] Moreover, court and agency precedent addressing the scope of 49 U.S.C. 10501(b)[16] have made it clear that, while not all state and local regulations that affect railroads are prohibited under this broad preemption regime,[17] zoning ordinances and local regulations cannot be used to veto or

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[13] The record indicates that, on July 31, 2001, without discussion of the Work Plan, IN&P was denied a zoning permit to salvage the line. Evidently, no guidance was given to IN&P as to the steps needed to obtain a permit or to adequately protect endangered species or comply with the Recovery Plan. Rather, according to IN&P, the Wallowa County Planning Commissioners stated that the permit was denied because Wallowa County wanted to buy the line and it did not want a trail on the right-of-way.

[14] E.g., Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319-21 (1981).

[15] Condition No. 4 does not specifically require that the County approve IN&P's Work Plan.

[16] In ICCTA, Congress broadened the express preemption provision at 49 U.S.C. 10501(b), so that both the jurisdiction of the Board over transportation by rail carriers and the remedies provided under 49 U.S.C. 10101-11908 are exclusive and preempt remedies provided under Federal or State law. 49 U.S.C. 10501(b). See City of Auburn v. STB, 54 F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999).

[17] Localities retain certain police powers to protect public health and safety. For example, non-discriminatory enforcement of state and local requirements such as building and electrical codes generally are not preempted. A local law prohibiting the railroad from dumping excavated earth into local waterways also would appear to be a reasonable exercise of local police power. However, state and local permitting requirements generally are preempted. See (continued...)

unreasonably restrict the railroad from conducting its operations or unreasonably burden interstate commerce. E.g., Norfolk S. Ry. v. City of Austell, No. 1:97-CV-1018-RLV, 1997 U.S. Dist. LEXIS 17236 at *17 n. 6 (N.D. Ga. Aug. 18, 1997); Friends of the Aquifer et al. – Declaratory Order, STB Finance Docket No. 33966, slip op. at 4-5 (STB served Aug. 15, 2001).

Here, the record shows that IN&P has worked with the County to try to accommodate the County's concerns. Moreover, it appears from the Work Plan that appropriate steps will be taken to protect salmon and any other fish species in the area when salvage occurs. Given the time that has elapsed and the importance of moving abandonment cases to resolution without unnecessary delay, so as to allow railroads to recoup those resources that are no longer needed for rail operations, we will now replace the four environmental conditions that were imposed in our March 1997 decision with a new condition permitting IN&P to commence salvage so long as it is performed in accordance with the Work Plan.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to reopen is denied.

2. The environmental conditions previously imposed on this exemption are removed.

3. IN&P may commence salvage of the line so long as salvage is performed in accordance with Work Plan for Track Removal, dated May 22, 2001, as revised June 22, 2001.

4. This decision is effective on December 23, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary

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[17](...continued)
Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001, and Oct. 5, 2001).